

Office of the Attorney General State of Texas

DAN MORALES

April 26, 1993

Ms. Gretchen Kuehn Bohnert Assistant City Attorney City of Houston P.O. Box 1562 Houston, TX 77251-1562

OR93-193

Dear Ms. Bohnert:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 19006.

The Houston Health Department and Mayor Bob Lanier received a request for several different categories of information. Specifically the request includes:

- 1. Documents detailing all rental agreements executed by any representative of the Magnolia Health Center with any private party for the use of the center auditorium or facilities since January 1, 1992.
- 2. Documents detailing all security reports for the Magnolia Multi Service Center since October, 1992, including but not limited to all reports filed by RGG security, and Wells Fargo.
- 3. Documents detailing all travel and entertainment since January 1, 1992, by the Health Director, Sharon Marsh [] and all management employees who report directly to the health director.
- 4. All internal memorandum relating to the proposed merger of the county and city health services, including but not limited to any correspondence between David Harris and Dr. Mary Kendrick.
- 5. All internal memoranda relating to open records requests submitted to the Health Department by KTRK TV since January 1, 1992.

6. All correspondence between Neighborhood Centers, Inc. and any official or representative of the Houston Health Department since September 1, 1992.

You have agreed to disclose all documents requested in items 1 through 3, and some of the documents included in items 4 through 6. You contend that several documents included in those requests are excepted from required public disclosure by sections 3(a)(1), 3(a)(3), 3(a)(6), 3(a)(7), and 3(a)(11).

You claim that two of the documents requested in item 4, a draft of a contract between the City of Houston and the County of Harris, and the concept paper on which the contract was based, are excepted from disclosure by section 3(a)(7) as a privileged communication between a government entity and its legal counsel. Communications from the client to the attorney concerning the subject matter of the representation are privileged. Open Records Decision No. 574 (1990). Moreover, section 3(a)(7) protects from disclosure communications by an attorney to the client which reveal client confidences. *Id.* The draft of the contract between the city and county reveals client confidences communicated by the client to the attorney in the concept paper. The draft of the contract and the concept paper are therefore excepted from required public disclosure by section 3(a)(7).

You also claim that some of the documents in item 4 constitute "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency" under section 3(a)(11) of the act and, therefore, is excepted from public disclosure. ¹

For several months now, the effect of the section 3(a)(11) exception has been the focus of litigation. In *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), the Third Court of Appeals recently held that section 3(a)(11) "exempts those documents, and only those documents, normally privileged in the civil discovery context." *Gilbreath* at 413. The court has since denied a motion for rehearing this case.

We are currently reviewing the status of the section 3(a)(11) exception in light of the Gilbreath decision. In the meantime, we are returning your request to you and asking that you once again review the information and your initial decision to seek closure of this information. We remind you that it is within the discretion of governmental bodies to release information that may be covered by section 3(a)(11). If, as a result of your review, you still desire to seek closure of the information, you must re-submit your request and the documents at issue, along with your arguments for withholding the information pursuant to section 3(a)(11) or any other exception that you have previously raised. You must

¹You say that there is no known correspondence between David Harris and Dr. Mary Kendrick. The Open Records Act does not require a government entity to make available information which does not exist. Open Records Decision No. 362 (1983).

submit these materials within 15 days of the date of this letter. This office will then review your request in accordance with the *Gilbreath* decision. If you do not timely resubmit the request, we will presume that you have released this information.

With respect to the information requested in item 5, you claim that the documents you submitted for our review are excepted from disclosure by section 3(a)(3), the litigation exception. Section 3(a)(3) excepts from disclosure information that relates to pending or anticipated litigation. Open Records Decision No. 551 (1990). However, once the documents are made available to the other party in litigation, section 3(a)(3) cannot be invoked to shield the information from public disclosure. *Id.* at 4. We have inspected the documents and we agree that they relate to pending litigation, *Williams v. City of Houston, No 93-04868* (Dist. Ct. of Harris County, 215th Judicial Dist. of Texas, Feb. 4, 1993). Therefore, you may withhold the documents, assuming that the opposing party in the litigation has not had prior access to them.

You claim that several of the documents in item 6 contain the same information excepted from disclosure by a prior determination of this office, Open Records Letter 93-052. After inspecting the documents and comparing them to the information in question in Open Records Letter 93-052, we agree that it is the same information we determined to be confidential by law under section 3(a)(1). We have marked the information on the documents that we conclude is excepted by section 3(a)(1). You must withhold the marked information and release the remaining information.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR93-193.

Yours very truly,

Loretta R. DeHay

Assistant Attorney General Opinion Committee

LRD/KKO/le

Ref.: ID# 19006

ID# 19092

Enclosures: OR93-052

Marked documents

cc: Mr. Wayne Dolcefino

KTRK-TV P.O. Box 13

Houston, Texas 77001

(w/o enclosures)